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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,
Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,
Defendant/Counterclaim-Plaintiff.

**REDACTED MEMORANDUM IN
SUPPORT OF IBM'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
ITS COUNTERCLAIM FOR COPYRIGHT
INFRINGEMENT (EIGHTH
COUNTERCLAIM)**

(ORAL ARGUMENT REQUESTED)

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

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Defendant/Counterclaim-Plaintiff International Business Machines Corporation (“IBM”) respectfully submits this memorandum in support of its motion for partial summary judgment with respect to liability and a permanent injunction on its counterclaim for copyright infringement against Plaintiff/Counterclaim-Defendant The SCO Group, Inc. (“SCO”) (Eighth Counterclaim).

Preliminary Statement

Linux is a computer operating system that has been (and is being) developed collaboratively by thousands of developers over the Internet. Like many others, IBM has contributed source code to the development of Linux and owns valid copyrights in its contributions.

SCO has, without permission, copied code from sixteen discrete packages of copyrighted source code written by IBM for Linux and distributed those copies as part of its own Linux products. SCO has literally copied more than 783,000 lines of code from these sixteen packages of IBM’s copyrighted material. As a result of SCO’s copying and distribution of IBM’s code, SCO has unlawfully exercised IBM’s rights to its works and therefore infringed IBM’s copyrights.

Although IBM’s contributions to Linux are copyrighted, they are permitted to be copied, modified and distributed by others under the terms of the GNU General Public License (“GPL”) or the GNU Lesser General Public License (“LGPL”) (collectively, the “GPL”). However, SCO has renounced, disclaimed and breached the GPL and therefore the GPL does not give SCO permission or a license to copy and distribute IBM’s copyrighted works.

As is discussed below, there are no genuine issues of material fact as to SCO’s liability. Accordingly, IBM is entitled to partial summary judgment and a permanent injunction on its copyright infringement counterclaim against SCO.

Statement of Undisputed Facts¹

A. Linux.

1. The development of Linux began when an undergraduate student at the University of Helsinki, Linus Torvalds, set out to create a new, free operating system. (Ex. 1 (SCO Linux Introduction Version 1.2) at 1-5.) In 1991, Torvalds began developing the Linux “kernel”, the core of the operating system, and posting news of his project to Internet newsgroups, along with a call for volunteers to assist in his efforts. (Id.)

2. With the Internet providing for a distributed collaboration, other programmers joined to write the code making up the kernel. (Ex. 1 at 1-5.) Torvalds directed the collaboration to a version 1.0 release of the Linux kernel in 1994. (Id.)

3. In the years that followed, thousands of developers, including developers at SCO and IBM, contributed to the further development of Linux. (See Ex. 2 (Ans. to Second Am. Countercls.) ¶ 45; Ex. 3 (SCO website pages identifying SCO’s contributions to Linux); Ex. 4 (SCO’s Fiscal Year 2000 10-K/A) at 15, 22, 26; Bennett Decl. ¶ 7.)

4. A number of companies distribute Linux. (Ex. 4 at 5-8, 26.) These distributors offer a variety of commercial Linux products, which typically comprise the Linux kernel, the applications that the kernel runs (which, with the kernel, comprise a complete operating system) and whatever else the distributor chooses to combine into an easily installable product. (See id. at 5-8.)

5. SCO was founded in 1994 under the name Caldera, Inc., as a commercial distributor of Linux products. (Ex. 4 at 29-31.) Over the years, SCO has developed and

¹ The undisputed (and indisputable) facts supporting this motion are set out in the accompanying Declaration of Kathleen Bennett (“Bennett Decl.”), and the documents appended to and/or authenticated by the Declaration of Amy F. Sorenson. The Exhibits referenced herein are cited as “Ex. ___” and submitted with the Sorenson Declaration; the Addenda referenced herein are appended to this memorandum.

marketed a number of software products containing Linux code, including Caldera Network Desktop, OpenLinux and SCO Linux. (Ex. 4 at 30-31; Ex. 24 (30(b)(6) Deposition of Erik W. Hughes (“Hughes Dep.”) at 13:17-17:18, 34:12-36:17.)

B. IBM’s Contributions to Linux.

6. IBM has made substantial contributions of computer code to Linux, including, in particular, to the Linux kernel. (Bennett Decl. ¶¶ 6-7; Ex. 2 ¶¶ 20, 108.)

7. Like other contributors to Linux, IBM holds copyrights, including registered copyrights, on many of its contributions to Linux. (Bennett Decl. ¶ 5.)

8. Among IBM’s copyrighted contributions to Linux is computer code for which IBM has registered copyrights under the following names and registration numbers on the following dates (collectively, the “IBM Copyrighted Works”):

1.	Enterprise Volume Management System	TX 5-757-696	August 15, 2003
2.	Enterprise Class Event Logging	TX 5-757-697	August 15, 2003
3.	Dynamic Probes	TX 5-757-698	August 15, 2003
4.	Linux Support Power PC64	TX 5-757-699	August 15, 2003
5.	Omni Print Driver	TX 5-757-700	August 15, 2003
6.	Journaled File System	TX 5-757-701	August 15, 2003
7.	Next Generation Posix Threading	TX 5-757-702	August 15, 2003
8.	Linux Kernel Support for JFS	TX 5-856-466	February 2, 2004
9.	Linux Kernel S390 Support	TX 5-856-467	February 2, 2004
10.	Linux Kernel Support for Service Processor	TX 5-856-468	February 2, 2004
11.	Linux Kernel Support for Memory Expansion Technology	TX 5-856-469	February 2, 2004
12.	Linux Kernel Support for IBM eServer iSeries Devices	TX 5-856-470	February 2, 2004
13.	Linux Kernel Support for PCI Hotplug	TX 5-856-471	February 2, 2004
14.	Linux Kernel Support for pSeries Hypervisor Terminal	TX 5-856-472	February 2, 2004

15.	Linux Kernel PPC64 Support	TX 5-856-473	February 2, 2004
16.	Linux Kernel Support for Mwave Modem	TX 5-856-474	February 2, 2004

(Exs. 5-20.) The registration of each of these IBM Copyrighted Works was made within five years of the first publication of the relevant work. (Bennett Decl. ¶ 5.)

9. IBM's "Enterprise Volume Management System" work (a copy of which is at Exhibit 5.1) is comprised of 328 files, containing 298,943 lines of code.

10. IBM's "Enterprise Class Event Logging" work (relevant portions of which are at Exhibit 6.1) includes 7 files containing 2,048 lines of code.

11. IBM's "Dynamic Probes" work (relevant portions of which are at Exhibit 7.1) includes 8 files containing 2,411 lines of code.

12. IBM's "Linux Support Power PC64" work (a copy of which is at Exhibit 8.1) is comprised of 55 files, containing 19,042 lines of code.

13. IBM's "Omni Print Driver" work (relevant portions of which are at Exhibit 9.1) includes 1,202 files containing 366,407 lines of code.

14. IBM's "Journaled File System" work (a copy of which is at Exhibit 10.1) is comprised of 39 files, containing 9,914 lines of code.

15. IBM's "Next Generation Posix Threading" work (a copy of which is at Exhibit 11.1) is comprised of 5 files, containing 1,851 lines of code.

16. IBM's "Linux Kernel Support for JFS" work (a copy of which is at Exhibit 12.1) is comprised of 2 files, containing 4,302 lines of code.

17. IBM's "Linux Kernel S390 Support" work (a copy of which is at Exhibit 13.1) is comprised of 72 files, containing 57,670 lines of code.

18. IBM's "Linux Kernel Support for Service Processor" work (a copy of which is at Exhibit 14.1) is comprised of 5 files, containing 2,554 lines of code.

19. IBM's "Linux Kernel Support for Memory Expansion Technology" work (a copy of which is at Exhibit 15.1) is comprised of 1 file, containing 2,277 lines of code.

20. IBM's "Linux Kernel Support for IBM eServer iSeries Devices" work (a copy of which is at Exhibit 16.1) is comprised of 2 files, containing 7,455 lines of code.

21. IBM's "Linux Kernel Support for PCI Hotplug" work (a copy of which is at Exhibit 17.1) is comprised of 1 file, containing 1,122 lines of code.

22. IBM's "Linux Kernel Support for pSeries Hypervisor Terminal" work (a copy of which is at Exhibit 18.1) is comprised of 1 file, containing 364 lines of code.

23. IBM's "Linux Kernel PPC64 Support" work (a copy of which is at Exhibit 19.1) is comprised of 8 files, containing 4,412 lines of code.

24. IBM's "Linux Kernel Support for Mwave Modem" work (a copy of which is at Exhibit 20.1) is comprised of 4 files, containing 2,523 lines of code.

25. IBM made the IBM Copyrighted Works publicly available by posting them on the Internet as part of the Linux development process. (Bennett Decl. ¶ 7.) SCO also had access to the IBM Copyrighted Works in its capacity as a partner in UnitedLinux. (*Id.* ¶ 8.)

C. SCO's Copying of the IBM Copyrighted Works.

26.

REDACTED

27. In addition, SCO made available to the public on its Internet website certain Linux code, including the code identified in the following sixteen subsections. (Ex. 23 (30(b)(6) Deposition of Christopher Sontag ("Sontag Dep.") at 220:20-224:19; Bennett Decl. ¶¶ 10-13.)

SCO continued to make that code available for download on its Internet website at least until August 4, 2004. (Bennett Decl. ¶¶ 10-13.)

28. As illustrated in detail in the following paragraphs, SCO's Linux products and the Linux code that SCO made available on its Internet website include code identical to code in the IBM Copyrighted Works, including their accompanying IBM copyright notices. (Exs. 5.1-20.3; Bennett Decl. ¶¶ 9-11.) SCO's Linux products and the Linux code it made available on its Internet website include over 783,000 lines of code identical to code in the IBM Copyrighted Works. (*Id.*)

1. Enterprise Volume Management System.

29. SCO has literally copied and distributed IBM's copyrighted "Enterprise Volume Management System" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available for download on its Internet website.

30. Specifically, 298,943 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum A. A copy of the relevant Linux files from SCO Linux Server 4.0 is attached as Exhibit 5.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 5.3 to the Sorenson Declaration.

2. Enterprise Class Event Logging.

31. SCO has literally copied and distributed portions of IBM's copyrighted "Enterprise Class Event Logging" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

32. Specifically, 2,048 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as

Addendum B. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 6.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 6.3 to the Sorenson Declaration.

3. Dynamic Probes.

33. SCO has literally copied and distributed portions of IBM's copyrighted "Dynamic Probes" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

34. Specifically, 2,411 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum C. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 7.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 7.3 to the Sorenson Declaration.

4. Linux Support Power PC64.

35. SCO has literally copied and distributed IBM's copyrighted "Linux Support Power PC64" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

36. Specifically, 19,042 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum D. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 8.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 8.3 to the Sorenson Declaration.

5. Omni Print Driver.

37. SCO has literally copied and distributed portions of IBM's copyrighted "Omni Print Driver" source code, both in its Open Linux 3.1.1 Asia product and in the Linux files that SCO made available on its Internet website.

38. Specifically, 366,407 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum E. A copy of the relevant files from Open Linux 3.1.1 Asia is attached as Exhibit 9.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 9.3 to the Sorenson Declaration.

6. Journalled File System.

39. SCO has literally copied and distributed IBM's copyrighted "Journalled File System" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

40. Specifically, 9,914 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum F. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 10.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 10.3 to the Sorenson Declaration.

7. Next Generation Posix Threading.

41. SCO has literally copied and distributed IBM's copyrighted "Next Generation Posix Threading" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

42. Specifically, 1,851 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as

Addendum G. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 11.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 11.3 to the Sorenson Declaration.

8. Linux Kernel Support for JFS.

43. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for JFS" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

44. Specifically, 4,302 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum H. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 12.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 12.3 to the Sorenson Declaration.

9. Linux Kernel S390 Support.

45. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel S390 Support" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

46. Specifically, 57,670 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum I. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 13.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 13.3 to the Sorenson Declaration.

10. Linux Kernel Support for Service Processor.

47. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for Service Processor" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

48. Specifically, 2,554 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum J. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 14.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 14.3 to the Sorenson Declaration.

11. Linux Kernel Support for Memory Expansion Technology.

49. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for Memory Expansion Technology" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

50. Specifically, 2,277 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum K. A copy of the relevant file from SCO Linux Server 4.0 is attached as Exhibit 15.2 to the Sorenson Declaration. A copy of the relevant Linux file available on SCO's Internet website is attached as Exhibit 15.3 to the Sorenson Declaration.

12. Linux Kernel Support for IBM eServer iSeries Devices.

51. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for IBM eServer iSeries Devices" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

52. Specifically, 7,455 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum L. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 16.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 16.3 to the Sorenson Declaration.

13. Linux Kernel Support for PCI Hotplug.

53. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for PCI Hotplug" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

54. Specifically, 1,122 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum M. A copy of the relevant file from SCO Linux Server 4.0 is attached as Exhibit 17.2 to the Sorenson Declaration. A copy of the relevant Linux file available on SCO's Internet website is attached as Exhibit 17.3 to the Sorenson Declaration.

14. Linux Kernel Support for pSeries Hypervisor Terminal.

55. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for pSeries Hypervisor Terminal" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

56. Specifically, 364 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum N. A copy of the relevant file from SCO Linux Server 4.0 is attached as Exhibit 18.2 to the Sorenson Declaration. A copy of the relevant Linux file available on SCO's Internet website is attached as Exhibit 18.3 to the Sorenson Declaration.

15. Linux Kernel PPC64 Support.

57. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel PPC64 Support" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

58. Specifically, 4,412 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum O. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 19.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 19.3 to the Sorenson Declaration.

16. Linux Kernel Support for Mwave Modem.

59. SCO has literally copied and distributed IBM's copyrighted "Linux Kernel Support for Mwave Modem" source code, both in the SCO Linux Server 4.0 software product that it sold to customers and in the Linux files that SCO made available on its Internet website.

60. Specifically, 2,523 lines of IBM's source code, including IBM copyright notices, appear verbatim and are identical to code in SCO's products, as indicated in the table attached as Addendum P. A copy of the relevant files from SCO Linux Server 4.0 is attached as Exhibit 20.2 to the Sorenson Declaration. A copy of the relevant Linux files available on SCO's Internet website is attached as Exhibit 20.3 to the Sorenson Declaration.

D. The GPL.

61. Although IBM's contributions to Linux are copyrighted, they are permitted to be copied, modified and distributed by others under the terms of the GPL or LGPL. (Ex. 2 ¶ 26; Ex. 24 at 66:5-13, 66:25-67:5, 75:16-20; Ex. 27 (GNU General Public License); Ex. 26 (GNU Lesser General Public License.) IBM has not authorized the copying, modification or distribution of the IBM Copyrighted Works, except pursuant to the terms of the GPL or LGPL. (Bennett Decl. ¶ 7.)

62. According to SCO, the GPL (and thus also the LGPL) “is unenforceable, void and/or voidable” (Ex. 2 at 20 (Sixth Affirmative Defense)); “violates the U.S. Constitution, together with copyright, antitrust and export control laws” (Ex. 25 (Amend. Ans. to Amend. Countercls.) at 16 (Eighth Affirmative Defense); Ex. 23 at 213:15-20); is unenforceable or inapplicable in this litigation (Ex. 2 ¶¶ 24, 28, 155, 157); and is preempted by federal copyright law and unenforceable under state law. (Ex. 22 (SCO’s Resp. to IBM’s Third Set of Interrogatories) at 38-39.) SCO also claims all rights to enforce the GPL (and thus also the LGPL) are waived and all are estopped from enforcing the GPL. (Ex. 2 at 20 (Seventh Affirmative Defense); Ex. 23 at 213:14-215:7.)

63. The GPL and LGPL provide that a person may rely on the GPL or LGPL as a license or grant of permission (to copy, modify or distribute code covered by the GPL or LGPL) only if the person abides by the terms of the GPL or LGPL. (Ex. 27 § 5; Ex. 26 § 9) The GPL and LGPL expressly provide that any attempt otherwise to copy, modify, sublicense, or distribute the code licensed under the GPL or LGPL “is void, and will automatically terminate your rights under this License”. (Ex. 27 § 4; Ex. 26 § 8.)

64. The GPL and LGPL provide, for example, that a person may not copy, modify, sublicense, or distribute code covered by the GPL or LGPL except as expressly provided under the GPL or LGPL (Ex. 27 § 4; Ex. 26 § 8), and may not impose any “further restrictions” on the recipients’ exercise of the rights granted under the GPL or LGPL. (Ex. 27 § 6; Ex. 26 § 10.)

65. Among the “further restrictions” that the GPL and LGPL do not permit are royalties or licensing fees (Ex. 27 §§ 2, 3; Ex. 26 §§ 2, 4) (although fees can be collected for “the physical act of transferring a copy” of the code or for warranty protection). (Ex. 27 § 1; Ex. 26 § 1.) If modified works or machine-readable versions of GPL- or LGPL-licensed software are distributed, they must be licensed “at no charge to all third parties under the terms of this License.” (Ex. 27 § 2 (emphasis added); Ex. 26 § 2; see also Ex. 27 § 3; Ex. 26 § 4.)

66. SCO has collected, and attempted to collect, royalties and licensing fees from Linux users in excess of the fees permitted by the GPL and LGPL to be collected for the “physical act of transferring a copy” of the code or for warranty protection (Ex. 27 §§ 1, 2, and 3; Ex. 26 §§ 1, 2, and 4), and in doing so, has attempted to copy, modify, sublicense, or distribute the code licensed under the GPL or LGPL other than as “expressly provided under [the GPL or LGPL]”. (Ex. 27 § 4; Ex. 26 § 8.) SCO has done so in at least the following ways:

- a. In May 2003, SCO sent letters to Fortune 1000 companies (including IBM) claiming that “Linux is, in material part, an unauthorized derivative of UNIX”. SCO further stated that “[w]e believe that Linux infringes on our UNIX intellectual property and other rights” and “intend to aggressively protect and enforce these rights”. (Ex. 28.)
- b. In a May 14, 2003 press release, SCO stated that “Linux is an unauthorized derivative of UNIX and that legal liability for the use of Linux may extend to commercial users”. SCO warned that non-SCO Linux customers could face liability for using Linux “software to run their business”. (Ex. 29.)
- c. In a July 21, 2003 press release, SCO announced that it would be offering licenses to Linux end users, who could otherwise “face liability for running [Linux] in their organizations”. (Ex. 30.)
- d. In an August 5, 2003 press release, SCO announced the availability of a license from SCO that “permits the use of SCO’s intellectual property, in binary form only, as contained in Linux distributions”. (Ex. 31.)

e.

REDACTED

f.

REDACTED

g.

REDACTED

REDACTED

- h. In a December 22, 2003 press release, SCO announced that it had “commenced providing notification to selected Fortune 1000 Linux end users” that their distribution or redistribution of Linux containing code on which SCO purported to hold copyrights would constitute infringement. (Ex. 35.)
- i. In connection with its December 22 press release, SCO released a template of a letter dated December 19, 2003, sent to “Linux User”. In that letter, SCO wrote that “the use of the Linux operating system in a commercial setting violates our rights under the United States Copyright Act, including the Digital Millennium Copyright Act” and that “we will take appropriate actions to protect our rights”. (Ex. 36.)
- j.

REDACTED

- k.

REDACTED

- l. On March 3, 2004, SCO sued AutoZone, Inc., in the United States District Court for the District of Nevada, alleging that AutoZone, through its use of Linux, is infringing copyrights SCO purports to hold on UNIX, and sought to collect, as “damages”, license fees and royalties in excess of that permitted to be collected by the GPL or LGPL. (Ex. 39.)
- m. On August 10, 2004, SCO was reported to be threatening to raise the price of its licenses “which it says companies running Linux need to buy in order to avoid being sued”. (Ex. 40.)
- n. SCO’s entire SCOSource division is dedicated to selling licenses that “give end users the right to use the SCO intellectual property contained in Linux, in binary format only”. (Ex. 41.)

Summary Judgment Standard

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); In re Grandote Country Club Co., 252 F.3d 1146, 1149 (10th Cir. 2001). A party may seek partial summary judgment as to liability, even though there may be a genuine issue as to the amount of damages, and the same standard governs its grant. Fed. R. Civ. P. 56(c).

Argument²

SCO HAS INFRINGED IBM’S COPYRIGHTS

Under the federal Copyright Act, “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, directly or with the aid of a machine or a device”. 17 U.S.C. § 102. Such works of authorship include computer programs. See Raymond T. Nimmer, Law of Computer Technology § 1:3 (“it no longer can be doubted that copyright law applies to software technology”). A copyright gives the holder certain exclusive rights, which it may license or assign, singly or in combination. 17 U.S.C. § 106. Those rights include the right “to reproduce the copyrighted work”, “to prepare derivative works based upon the copyrighted work”³ and “to distribute copies . . . of the copyrighted work to the public”. Id.

² The undisputed facts are cited herein (in the “Argument” section of this memorandum) as “¶ ___”, referring to the relevant paragraph number in the foregoing “Statement of Undisputed Facts”.

³ A “derivative work” means “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast”. 17 U.S.C. § 101.

To prevail on a claim of copyright infringement, a copyright holder must establish (1) that it owns the copyright to the copyrighted work, and (2) that the alleged infringer violated one or more of the holder's exclusive rights. See Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1487 (10th Cir. 1993); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1292 (D. Utah 1999).

In this case, there is no genuine dispute that (1) IBM owns valid copyrights in the IBM Copyrighted Works and (2) SCO has reproduced and distributed the IBM Copyrighted Works as part of its Linux software products and on its Internet website. (¶¶ 7-8, 26-60.) Accordingly, IBM is entitled to summary judgment as to liability and a permanent injunction against future infringement.

A. IBM Owns the Copyrights to the IBM Copyrighted Works.

Under the Copyright Act, a "certificate of registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate". 17 U.S.C. § 410(c); see Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 831-32 (10th Cir. 1993); Autoskill, 994 F.2d at 1487-88.

IBM has submitted the copyright registrations filed with the United States Copyright Office for the IBM Copyrighted Works. (¶¶ 8-24.) Each was registered within five years after first publication of the relevant work. (Bennett Decl. ¶ 5.) As a result, IBM is entitled to the presumption that it holds valid copyrights to the IBM Copyrighted Works. See Gates Rubber, 9 F.3d at 831-32; Autoskill, 994 F.2d at 1487-88.

B. SCO Has Copied and Distributed the IBM Copyrighted Works.

Copyright infringement consists of the unauthorized performance of acts the copyright holder has the exclusive right to perform. 17 U.S.C. § 501; see Gates Rubber, 9 F.3d at 831. As a general matter, a plaintiff may prove improper "copying", the shorthand reference for any

infringement of the copyright holder's exclusive rights,⁴ “by showing that (1) the defendant had access to the plaintiff's copyrighted work, and (2) defendant's work is substantially similar to the plaintiff's copyrightable material.” Autoskill, 994 F.2d at 1489 (quoting Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 701 (2d Cir. 1992)). When, however, “two works are so strikingly similar as to preclude the possibility of independent creation, ‘copying’ may be proved without a showing of access”. Ferguson v. Nat'l Broad Co., 584 F.2d 111, 113 (5th Cir. 1978); see Gates Rubber, 9 F.3d at 833 n.9 (citing Ferguson).⁵

In this case, there is no genuine dispute that SCO has copied the IBM Copyrighted Works. First, SCO undeniably had access to the IBM Copyrighted Works. IBM made its code available publicly on the Internet as part of the development process for Linux and the code was incorporated into Linux. (¶ 25.) The IBM Copyrighted Works are available on the Internet for anyone, including in particular commercial distributors of Linux such as SCO, to download and use under the terms of the GPL or LGPL. (Id.) SCO also had access to the IBM Copyrighted Works in its capacity as a partner in UnitedLinux. (Id.) Cf. Eve of Milady v. Impression Bridal, Inc., 957 F. Supp. 484, 489 (S.D.N.Y. 1997) (“This public display of plaintiffs’ bridal dresses and copyrighted lace designs in a bridal trade publication amounts to ‘access’ by defendants to plaintiffs’ copyrighted work.”).

⁴ Gates Rubber, 9 F.3d at 832 n.6 (noting that “[c]opying is used herein as a shorthand reference to any infringement of the copyright holder's exclusive rights”); see also Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1370 n.3 (10th Cir. 1997); Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1284 n.2 (10th Cir. 1996).

⁵ See also Wilcom Pty. Ltd. v. Endless Visions, 128 F. Supp. 2d 1027, 1031-32 (E.D. Mich. 1998) (“The similarity here between the copy and the original is so striking, there is no possibility of independent creation. Therefore, copying can be inferred regardless of proof of access.”).

Second, as described in detail above and demonstrated in the Addenda, more than 783,000 lines of source code from the IBM Copyrighted Works match exactly lines of source code that appear in SCO Linux Server 4.0 (or, in the case of Omni Print Driver, in Open Linux 3.1.1 Asia) and in the Linux source code available for download on SCO's Internet website. (¶¶ 29-60; Addenda A-P.)⁶ Indeed, the code published by SCO bears the very IBM copyright notices that IBM placed on its contributions to Linux. Hence, SCO's works are not merely "substantially similar", Autoskill, 994 F.2d at 1489; they are wholly identical, such that "the possibility of independent creation" is precluded. Ferguson, 584 F.2d at 113; see also Gates Rubber, 9 F.3d at 833 n.9.

To take just one example, IBM's copyrighted source code for the "pSeries Hypervisor Terminal" work appears in its entirety in SCO Linux Server 4.0 and in the Linux code that SCO made available on its website. (¶¶ 55-56.) Side-by-side comparisons of the code from one of the files from that work, as it appears in IBM's copyrighted work, and in SCO Linux Server 4.0 and on SCO's website are attached as Addenda Q and R, respectively.⁷ As indicated in Exhibit 25, lines 1 through 364 of the `hvc_console.c` file in IBM's "pSeries Hypervisor Terminal" work are identical to lines 1 through 364 of the corresponding file in SCO Linux Server 4.0. As indicated in Exhibit 26, lines 1 through 364 of the `hvc_console.c` file in IBM's "pSeries Hypervisor Terminal" work are identical to lines 1 through 364 of the corresponding file downloaded from SCO's website on January 8, 2004. The same pattern of line-for-line, verbatim copying emerges

⁶ See Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (offering access to materials constitutes distribution); Perry v. Sonic Graphic Systems, Inc., 94 F. Supp. 2d 616, 619, 621 (E.D. Pa. 2000) (holding that posting on website constitutes copying and distribution); Marobie-FL, Inc. v. Nat'l Assoc. of Fire Equip. Distribs., 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997) (same); Playboy Enters. v. Webbworld, Inc., 968 F. Supp. 1171, 1174-75 (N.D. Tex. 1997) (same).

⁷ IBM can provide similar demonstrative exhibits for each of its copyrighted works at the Court's request.

from side-by-side comparison of the other pSeries Hypervisor Terminal files, as they appear in IBM's copyrighted works and in SCO's products.⁸ (Compare Ex. 18.1 with Exs. 18.2 and 18.3.)

Through its distribution of its commercial products, SCO copied and distributed the IBM Copyrighted Works in violation of IBM's exclusive rights to do so (as the copyright holder). 17 U.S.C. § 501; Microsoft Corp. v. Computer Serv. & Repair, Inc., 312 F. Supp. 2d 779, 784 (E.D.N.C. 2004) (holding that having distributed an "unauthorized copy of software in which plaintiff holds a valid copyright, defendant has infringed plaintiff's exclusive rights under the Copyright Act"). SCO also violated IBM's exclusive rights to copy and distribute its copyrighted works by making available for download on SCO's Internet website Linux source code incorporating the IBM Copyrighted Works. See Hotaling, 118 F.3d at 203; Perry, 94 F. Supp. 2d at 619, 621.

* * *

As there can be no dispute as to IBM's ownership of copyrights in the IBM Copyrighted Works and that SCO has copied those works, summary judgment as to liability is appropriate, and SCO should be enjoined from further infringement. See, e.g., MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 517-19 (9th Cir. 1993) (affirming grant of summary judgment for infringement of operating system software copyright); Wilcom, 128 F. Supp. 2d at 1032

⁸ The source code for each of IBM's fifteen other copyrighted works similarly matches code in SCO products and the code available on SCO's Internet webpage. (Compare Ex. 5.1 with Exs. 5.2 and 5.3 (Enterprise Volume Management System); Ex. 6.1 with Exs. 6.2 and 6.3 (Enterprise Class Event Logging); Ex. 7.1 with Exs. 7.2 and 7.3 (Dynamic Probes); Ex. 8.1 with Exs. 8.2 and 8.3 (Linux Support Power PC64); Ex. 9.1 with Exs. 9.2 and 9.3 (Omni Print Driver); Ex. 10.1 with Exs. 10.2 and 10.3 (Journaled File System); Ex. 11.1 with Exs. 11.2 and 11.3 (Next Generation Posix Threading); Ex. 12.1 with Exs. 12.2 and 12.3 (Linux Kernel Support for JFS); Ex. 13.1 with Exs. 13.2 and 13.3 (Linux Kernel S390 Support); Ex. 14.1 with Exs. 14.2 and 14.3 (Linux Kernel Support for Service Processor); Ex. 15.1 with Exs. 15.2 and 15.3 (Linux Kernel Support for Memory Expansion Technology); Ex. 16.1 with Exs. 16.2 and 16.3 (Linux Kernel Support for IBM eServer iSeries Devices); Ex. 17.1 with Exs. 17.2 and 17.3 (Linux Kernel Support for PCI Hotplug); Ex. 19.1 with Exs. 19.2 and 19.3 (Linux Kernel PPC64 Support); and Ex. 20.1 with Exs. 20.2 and 20.3 (Linux Kernel Support for Mwave Modem).)

(granting summary judgment when the copied computer code “is so similar [to the copyrighted code] that reasonable minds could not differ”).

C. SCO Lacks Permission or a License to Copy or Distribute the IBM Copyrighted Works.

As stated, IBM has not authorized the copying, modification or distribution of the IBM Copyrighted Works, except pursuant to the terms of the GPL or LGPL. (¶ 61.) SCO does not have permission or any license to copy, modify, or distribute the IBM Copyrighted Works for at least two independent reasons: (1) SCO has repudiated and disclaimed the GPL (and thus also the LGPL) as a source of legal rights, and (2) SCO has breached the GPL and LGPL and thus lost any rights it might have had under the GPL or LGPL. (¶¶ 61-66.)

First, according to SCO, the GPL “is unenforceable, void and/or voidable”; “violates the U.S. Constitution, together with copyright, antitrust and export control laws”; is unenforceable or inapplicable in this litigation; and is preempted by federal copyright law and unenforceable under state law. SCO also claims all rights to enforce the GPL are waived and all are estopped from enforcing the GPL. (¶ 62.) As a result, SCO cannot here rely on the GPL or the LGPL (which is identical to the GPL insofar as relevant here) as a grant of license or permission to copy and distribute the IBM Copyrighted Works.

Second, SCO breached the GPL and the LGPL at least as early as May 2003 and thus, even if it had not otherwise repudiated and disclaimed the GPL and LGPL, automatically lost any rights it might have had under the GPL and LGPL to copy and distribute the IBM Copyrighted Works. (¶¶ 64-66.)

SCO has violated the GPL and the LGPL in several respects, including by attempting to collect royalties or licensing fees for the use of Linux. (¶¶ 64-66.) The GPL and LGPL provide, for example, that a person may not copy, modify, sublicense, or distribute code covered by the GPL or LGPL except as expressly provided under the GPL or LGPL and may not impose any

“further restrictions” on the recipients’ exercise of the rights granted under the GPL or LGPL. (§ 64.) Among the “further restrictions” that the GPL and LGPL do not permit are collecting royalties or licensing fees (although fees can be collected for “the physical act of transferring a copy” of the code or for warranty protection). (§ 65.) If modified works or machine-readable versions of open-source software are distributed, they must be licensed “at no charge to all third parties under the terms of this License”. (*Id.*)⁹

As detailed above (§ 66), SCO is attempting to collect, and has collected, licensing fees from Linux users, in violation of any permission or license it may have had under the GPL and LGPL. Because SCO has attempted to license Linux in violation of the GPL and LGPL, any permission or license it may have had under the GPL and LGPL (to copy the IBM Copyrighted Works) terminated. The GPL and LGPL expressly provide that any attempt otherwise than in accord with the GPL’s or LGPL’s restrictions to sublicense works subject to the GPL or LGPL “is void, and will automatically terminate your rights under this License”. (§ 63.)¹⁰ SCO’s efforts (under whatever guise) to collect licensing fees for GPL- or LGPL-licensed activities run afoul of the GPL and LGPL.

By its breaches of the GPL and LGPL, SCO has forfeited any protection against claims of copyright infringement that it may have enjoyed by virtue of the GPL or LGPL. SCO cannot violate the covenants that led to and underlie Linux without forfeiting the benefits those covenants confer. Because SCO has continued to distribute and copy Linux products containing

⁹ See Jason B. Wacha, Open Source, Free Software and the General Public License, 20 No. 3 Computer & Internet Law 20, 22 (2003) (stating that under the GPL, “royalties are not permitted” so a copyright holder who distributes GPLed code cannot charge money for others to use code subject to the GPL).

¹⁰ See Dennis M. Kennedy, A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft, and Copyfuture, 20 St. Louis U. Pub. L. Rev. 345, 360 (2001) (noting that a party’s rights under the GPL automatically terminate if it attempts to sublicense works subject to the GPL “except as expressly provided under the GPL”).

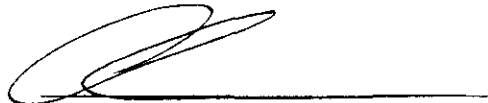
verbatim copies of IBM's Copyrighted Works after it disclaimed, renounced and breached the GPL and LGPL, SCO has infringed IBM's copyrights in those works, 17 U.S.C. § 501(a), and the GPL and LGPL afford SCO no protection against IBM's claim of infringement.

Conclusion

For the foregoing reasons, IBM is entitled to partial summary judgment with respect to liability on its Eighth Counterclaim for copyright infringement and a permanent injunction against further infringement.

DATED this 16th day of August, 2004.

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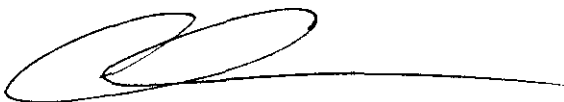
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2004, a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

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